

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KRISTINE J. MARION, as Personal Representative  
of the Estate of CHRISTOPHER FREEMAN,  
Deceased,

UNPUBLISHED  
January 11, 2000

Plaintiff- Appellant,

v

MASON IRON & STEEL COMPANY,

No. 207060  
Wayne Circuit Court  
LC No. 96-616140 NP

Defendant-Appellee.

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Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

In this wrongful death action, plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Christopher Freeman was killed when he was pinned between a moving railroad car on which he was riding and a cement wall. At the time of the accident, Freeman was employed by Personal Services, Inc. (PSI), and was assigned to defendant as a part-time general laborer. Defendant is in the business of recycling scrap iron and uses private rail lines and locomotive cranes to move railroad cars around its work yard. Defendant used temporary employees, rather than directly hiring additional full-time employees, in order to evaluate a temporary employee's performance before directly hiring him or her.

On the date for Freeman's death, an employee of defendant was absent from work and Freeman was reassigned to work as an assistant switchman, a job Freeman had neither previously performed nor had been trained to perform. The assistant switchman's duties were to help the switchman route railroad cars around the yard by physically changing the direction of tracks. It is common practice for switchmen and their assistants to ride the cars until just prior to where the car reaches the switching location, and then jump off and physically change the track. Freeman, however, was killed riding a railroad car to the lunch area. He was crushed between a concrete bin and the side of the car he was riding on. There was sufficient distance between the rail and the bin to allow the

railroad car to pass; however, there was not enough room to allow a person to pass between the car and bin.

Plaintiff claims that there is a question of fact as to whether Freeman was an employee of defendant for purposes of the WDCA. We disagree. We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

To determine whether an employment relationship exists for purposes of the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*, we apply the economic reality test. *Clark v United Technologies Automotive, Inc.*, 459 Mich 681, 687; 594 NW2d 447 (1999); see also *Oxley v Dep't of Military Affairs*, 460 Mich 536, 549-551; 597 NW2d 89 (1999).

Although the totality of the circumstances are considered, in applying the economic realities test, the courts generally consider the following four factors “(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.” [*Clark, supra* at 688, citing *Askew v Macomber*, 398 Mich 212, 217-218; 247 NW2d 288 (1976).]

Examining the evidence in the light most favorable to plaintiff, we find that defendant was Freeman's employer for the purposes of the WDCA. Defendant was engaged in a labor-broker relationship with PSI. Freeman was assigned to defendant through PSI, defendant used PSI to acquire temporary employees, and defendant was billed for each position a temporary employee. Generally, “the exclusive remedy available to the employee in a labor broker situation is provided by the workers' compensation statute and . . . a separate tort action against the customer of the labor broker may not be maintained.” *Farrell v Dearborn Mfg Co*, 416 Mich 267, 278; 330 NW2d 397 (1982).

Furthermore, defendant had control over what duties Freeman performed on the job. Although, PSI paid Freeman, defendant could control the wages of temporary employees by assigning them to more skilled positions. Defendant had the absolute right to hire or fire a temporary employee at any time. Additionally, temporary employees owed no obligation to continue to work for defendant, and could leave defendant's employment at any time. Finally, the position Freeman held was integral to the accomplishment of the business in which defendant was engaged.

Plaintiff also argues that there is a question of fact concerning whether defendant committed an intentional tort thereby providing an exception to the exclusive remedy provision of the WDCA, MCL 418.131(1); MSA 17.237(131)(1). We disagree.

Generally, the right to recover benefits provided in the WDCA is the exclusive remedy against an employer for a personal injury. MCL 418.131(1); MSA 17.237(131)(1); *Palazzola v Karmazin Products*, 223 Mich App 141, 147; 565 NW2d 868 (1997). However, the Legislature, in 1987, amended the WDCA to provide an exception to the exclusive remedy provision.

The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131(1); MSA 17.237(131)(1).]

In this case, plaintiff did not allege that defendant committed an “intentional tort” as that term is commonly used in tort law. Rather, plaintiff contends that defendant knew, or reasonably should have known, that an injury was certain to occur and disregarded that knowledge. The Michigan Supreme Court closely examined this type of intentional tort exception to the WDCA in two consolidated cases, *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), and *Golec v Metal Exchange Corp*, 453 Mich 149; 551 NW2d 132 (1996). The *Travis* Court set a high standard for an intentional tort, saying:

[T]he employer’s act or failure to act must be more than mere negligence, that is, a failure to act to protect a person who might foreseeably be injured from an appreciable risk of harm. An employer is deemed to have possessed the requisite state of mind when it disregards actual knowledge that an injury is certain to occur. [*Travis*, *supra* at 179 (Boyle, J.).]

The question in this case is whether defendant knew that an injury was certain to occur from the close proximity of the concrete bin to the railroad track. Plaintiff supports her position with two affidavits from expert witnesses. Each of the engineering experts provide the same opinion that, “the fatal injury to Chris Freeman was certain to eventually occur.” However, as expressly found by the *Travis* Court, “conclusory statements by experts are insufficient to allege the certainty of injury contemplated by the Legislature.” *Id.* at 174 (Boyle, J.). Plaintiff also cites deposition testimony from a locomotive crane operator who indicated that defendant’s foreman was told of the dangerous placement of the concrete bin when it was being constructed.<sup>1</sup> Mere knowledge of a potential hazard arising from the proximity of the concrete bin to the tracks does not equate to certainty that an injury will occur. See *Bazinau v Mackinac Carriage Tours*, 233 Mich App 743, 755-756; 593 NW2d 219 (1999).

The facts of this case stand in stark contrast to the facts in *Golec*, *supra*. In *Golec*, the employee, who had just returned to work after an extended disability leave, was instructed to load wet steel scrap which included aerosol cans into a blast furnace with a loading device that had been modified to remove its safety shield. *Id.* at 157 (Boyle, J.). Although loading wet scrap or aerosol cans into a blast furnace creates a high risk of a molten metal explosion, the employer instructed Golec to do the job. *Id.* at 158, 184-186 (Boyle, J.). Shortly after undertaking the assignment, as instructed by the

employer, a minor explosion occurred, burning the employee on his arm. *Id.* at 158 (Boyle, J.). The employer again instructed the employee to finish the job. *Id.* at 158-159 (Boyle, J.). The employee continued loading the scrap, as directed by his employer. *Id.* Shortly thereafter, a more severe explosion occurred, causing serious burns to more than thirty percent of plaintiff's body. *Id.* Based on these facts, the Supreme Court concluded that a fact question existed concerning whether the employer actually knew that injury was certain to occur. In the present case, unlike *Golec*, the employer did not instruct the employee to expose himself to risk; no one ordered Freeman to ride the train through the area of the restricted clearance. Defendant was, at most, negligent. Examining the evidence in the light most favorable to plaintiff, we find no issue of material fact as to whether defendant committed an intentional tort. Therefore, summary disposition was proper.

In sum, we find the trial court properly granted summary disposition for defendant because plaintiff was an employee of defendant and defendant's actions did not constitute an intentional tort. The Worker's Disability Compensation Act is therefore plaintiff's exclusive remedy.

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Brian K. Zahra

<sup>1</sup> Defendant's foreman denies ever being told that there was a risk of injury arising from the placement of the concrete bin.